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10-19-1982 Correspondence from Rehnquist to Burger

William H. Rehnquist
US Supreme Court Justice

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HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 19, 1982

Re: No. 81-430 Illinois v. Gates

Dear Chief:

I have received Byron's letter containing its motion to reargue this case, made in response to John's earlier communication regarding our denial of a motion by the petitioner to enlarge the questions presented for decision. While I will probably end up voting to grant re-argument, I do have some mixed feelings about the question which I set forth in the following paragraphs.

My Conference notes indicate that there were at least five votes to reverse the judgment of the Supreme Court of Illinois without the necessity of adopting a "good faith exception" to the exclusionary rule in the case of evidence seized pursuant to a search warrant. If this majority would adhere to a position that cases such as Aguilar and Spinelli remain unmodified as the law in this area, and that the Supreme Court of Illinois simply misapplied them, I would certainly agree that the case would not amount to much, and that re-argument on the "good faith exception" requirement would be far preferable than such a result.

But I thought there was also sentiment at Conference -- whether or not sentiment harbored by a majority a resort to my notes does not indicate one way or the other -- that at the very least Draper should be fully reestablished as an alternative basis to Aguilar and Spinelli for validating warrants. I do not think this result is so insubstantial as to be dismissed out of hand in preference for a re-argument on the "good faith exception."

Starting with Nathanson v. United States, 290 U.S. 41 (1933), a three page decision from the good old days holding that a warrant to search a private dwelling may not be issued unless the magistrate "can find probable cause

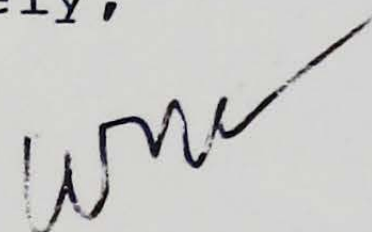
therefor from facts or circumstances presented to him under oath or affirmation," 290 U.S., at 47, the Court has come a long way in the direction of requiring greater and greater compliance with what are arguably highly technical requirements; the cockles of my heart, at any rate, are not warmed by seeing lower courts struggling in long opinions with the "veracity prong" and the "knowledge prong" of cases such as Aguilar and Spinelli. There seems to be another trend afoot at the same time, which, while not contradicting the above-mentioned cases, proceeds on much more of a "totality of the circumstances" approach. Cases such as Draper v. United States, 358 U.S. 307 (1959), United States v. Ventresca, 380 U.S. 102 (1965), and the opinion of the majority of Harry's old Court in Spinelli v. United States, 382 F.2d 871 (1967) are examples of these opinions.

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I think a reconsideration of some of these principles governing the contents of an application for a warrant is somewhat overdue, and I cannot as presently advised satisfy myself that such a result would be a less significant contribution to the law in this area than would be a "good faith exception" made to the exclusionary rule. In the case of a good faith exception, whatever its contours might be, the magistrates would presumably still be operating under Aguilar and Spinelli even though the police officers would be given the benefit of a broader rule in determining whether the evidence seized pursuant to such warrants should be excluded. Likewise, in cases where a defendant has effects seized pursuant to a warrant, is bound over for trial, but for some reason or another the case is dismissed, the officers could well face a suit pursuant to 42 U.S.C. § 1983 which would be governed by precedents such as Aguilar and Spinelli.

I would find it helpful, in deciding whether to set Gates for reargument, to be further enlightened on the contours that a good faith exception would assume. In the light of cases such as Procunier v. Navarette, 434 U.S. 555 (1978), and Scheuer v. Rhodes, 416 U.S. 232 (1974), dealing with qualified immunity under §1983, and United States v. Peltier, 422 U.S. 531 (1975), dealing with "reasonableness" in the context of retroactivity, it might appear that a good faith exception would include some sort of objective reasonableness requirement. I would also think, however, that the "reasonableness" component of the test could be satisfied almost automatically. It seems to me that it would defy common sense to expect patrolmen and detectives to second-guess the supposedly legal judgment of a "neutral

and detached magistrate," Johnson v. United States, 332 U.S. 10, 14 (1948). If there is to be more to the test than the mere obtaining of a warrant from a duly authorized magistrate, would it involve somewhat relaxed Aguilar and Spinelli standards? And if it would, are we really better off with a "good faith exception" than we would be by reconsidering Aguilar and Spinelli?

Sincerely,

A handwritten signature in dark ink, appearing to be 'Wm' followed by a flourish.

The Chief Justice

cc: The Conference